**THE GSA NHPA SECTION 106 CONSULTATION**
**RE: MURALS IN ARIEL RIOS BUILDING**
**COMMENTS BY ROLAND CYR AND ROBERT SMITH**

## I. Introduction

These comments are submitted by Latham & Watkins, LLP and the Lawyers' Committee for Civil Rights Under the Law, on behalf of our clients, Roland Cyr and Bob Smith. Mr. Cyr and Mr. Smith are EPA employees. Although we maintain our position that the National Historic Preservation Act (NHPA) Section 106 process is not legally necessary for the General Services Administration (GSA) to take action with respect to the murals at issue,[1] we commend GSA for its decision to initiate a process that presents a real opportunity to find a solution to the workplace issues that have arisen at the Ariel Rios building.

At the outset, we want to acknowledge that we do not question the artistic and creative legitimacy of these paintings or the views of the artists involved. These paintings were created during a period in our history when stereotypes about certain groups in our society were widespread and rarely challenged. In addition, we do not question the sincerity of the Mechau family in defending the paintings of Frank Mechau. Our quarrel is not with the value or legitimacy of the art, or with the views of any artist, but with the effect that the artworks have in a workplace setting.

Our clients and members of the American Indian community believe that these paintings create a hostile and divisive work environment in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2) (2000). See Attachment 1, Smith Affidavit ¶¶ 9, 17, 22 (describing how the paintings at issue have created a hostile work environment). We do not, however, ask GSA to make such a finding. Instead, we believe that GSA can satisfy the obligations it believes it has under the NHPA and carry out its role as chief steward of the federal workplace by making a determination to adopt adequate mitigating measures.

GSA should bear in mind that neither the NHPA nor its own policy precludes the option of relocating these paintings. Rather, the NHPA only requires GSA to consider whether Ariel Rios or the paintings qualify as "historic" properties under the Act, and then to consider—in consultation with other interested parties—whether their actions will adversely affect any such "historic" properties. If its actions will adversely affect any historic properties, NHPA requires GSA to develop appropriate mitigation measures in consultation with other interested parties, including tribes. *See* 16 U.S.C. § 470f; *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999). Assuming GSA determines that both the Ariel Rios Building and the paintings are "historic" under the NHPA, and that relocating them would result in an adverse effect, GSA can take steps, consistent with its own internal guidelines and the NHPA, to mitigate their impact.

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[1] The six artworks consist of four free-hanging paintings, *Dangers of the Mail* and *Pony Express*, by Frank Mechau; *Covered Wagon Attacked by Indians*, by William C. Parker; *French Explorers and Indians*, by Karl R. Free; and two murals by Ward Lockwood: *Opening of the Southwest* and *Consolidation of the West*.

It is our clients' position that none of the paintings should be displayed in a workplace setting. All of the paintings painted on canvas should be removed from the workplace. Additionally, those frescoes that may be painted on the wall and cannot be moved should be covered. See Attachment 1, Smith Affidavit ¶¶ 10, 23.

**II. Relationship Between the Federal Government and American Indians**

It is clear to all that the relationship between the United States Government and American Indians has evolved painfully and slowly throughout the life of the country. We remain hopeful that this relationship is evolving from open hostility and perpetuation of offensive stereotypes to one of mutual respect and sensitivity toward American Indians' heritage and individual dignity. Although there is still much progress to be made, we believe it is fair to say that most twenty-first century artists would simply not create paintings today with the same insensitivity and unconscious hostility toward American Indians that we can see in the works of the New Deal era. This radical change in perspective means that the goals of the NHPA must be reconciled with the duty of the Federal Government in general, and GSA in particular, to create productive and discrimination-free workplaces for federal employees. Removal of the paintings from the work environment is also consistent with the GSA's general duty to act in the best interests of American Indians under the federal trust responsibility.[2]

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[2] The federal government's general obligation to act in the best interest of American Indians is a duty deeply rooted in American history and jurisprudence. This duty has been traced back to treaties entered into between the United States and Indian tribes guaranteeing that the United States would protect the tribes. Since 1831, the Supreme Court has consistently recognized the duty of the federal government to act in the best interest of American Indians. *See Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *United States v. Mason*, 412 U.S. 391 (1973); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Tulee v. State*, 315 U.S. 681 (1942); *United States v. Santa Fe Pac. Ry.*, 314 U.S. 339 (1941); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 103 (1935); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Payne*, 264 U.S. 446, 448 (1924); *Cramer v. United States*, 261 U.S. 219 (1923); *United States v. Nice*, 241 U.S. 591 (1916); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Heckman v. United States*, 224 U.S. 413, 437-38 (1912); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902); *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641 (1890); *Choctaw Nation v. United States*, 1919 U.S. 1, 28 (1886); *United States v. Kagama*, 118 U.S. 375 (1886); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Furthermore, as seen in *Manchester Band of Pomo Indians v. United States*, the executive branch, including federal agencies such as GSA, are also subject to the fiduciary relationship between the federal government and American Indians, therefore regarding executive agencies to act in the best interests of American Indians. 363 F. Supp. 1238 (N.D. Cal. 1973) (imposing a duty of loyalty on federal officials and suggesting that when actions or projects of federal agencies conflict with the trust responsibility to Indians, the non-American Indian federal activity should be operated in the best interests of American Indians).

The importance of this government-to-government relationship was cast in broad terms by Executive Order 13084, a broadly-worded policy directive applying to all "regulatory practices on Federal matters that significantly or uniquely affect [Indian] communities . . ." Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27655 (May 14, 1998). It directs each agency to "have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input" in developing policies that uniquely affect their communities. *Id.* The Executive Order recognizes the federal government's unique trust responsibility to American Indians.

**III. GSA's Unique Role**

GSA plays a unique and particularly significant role in guarding against workplace discrimination. Although the EEOC is the federal agency with primary responsibility for enforcing non-discrimination laws, the GSA also has a responsibility to provide a workplace environment free of discrimination. Indeed, the GSA should model how American work spaces balance functionality and celebration of a racially and culturally diverse workforce. This responsibility is reflected in GSA's own statements. For example, in recognition of Dr. Martin Luther King, Jr., GSA Administrator Stephen Perry spoke of GSA's role in cultivating respect and harmony among GSA's own employees. *See* Stephen A. Perry, Address at the Martin Luther King Ceremony, GSA Auditorium, Washington, D.C. (Jan. 13, 2003). GSA also has a special responsibility toward American Indian individuals and to the tribes, with which GSA has a unique government-to-government relationship. *See* GSA, ADM 1072.1 GSA Policy Toward American Indian and Alaskan Tribes § 5(a) (Nov. 17, 1999). This relationship exists inside and outside Indian country. It applies to all GSA actions or policies "that will significantly or uniquely affect" tribal governments. *Id.*

We recognize that there are some unique challenges in applying the NHPA to works of art in the context of strong evidence that the artworks are offensive to American Indians in a workplace environment. The policy of the NHPA is to require agencies to give considerable weight to the value of preserving historically significant structures and works of art. This value is not to be ignored in the face of other policy considerations, such as lowering costs and increasing efficiency. However, it is also clear that the value of preserving structures and works of art must be weighed alongside other compelling considerations. These include preserving workplaces free of discrimination. The tension between valuing works of art and guarding against workplace discrimination is by no means unprecedented. For example, the Library of Congress in 1995 removed an exhibit entitled, "Back to the Big House: The Cultural Landscape of the Plantation," five hours after African American Library employees complained about its appropriateness in their workplace. *See* John Milne, "Controversy Closes Exhibit on Slavery," *Boston Globe*, Dec. 23 1995, Metro Section, at 17.

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Accordingly, GSA is governed by the federal trust relationship and should act in the best interests of American Indians in this matter by removing the paintings from the work place.

## IV. GSA's Internal Guidelines and the NHPA's Procedural Requirements

GSA's internal guidelines and the NHPA's procedural requirements permit GSA to relocate the offensive paintings. GSA's internal administrative order, ADM 1020.2, Procedures for Historic Properties, ch. 3 §15(d) (Oct. 19, 2003), sets out a number of guidelines for preserving site-specific art that contributes to the preservation of an historic property.

ADM 1020.2 recommends that "[i]nterpretation and appropriate education shall be provided to educate tenants and visitors concerning architecturally integral or site-specific art threatened as a result of changing social or political perspectives, separation between the artwork and the audience for whom it was designed, . . . , or for other reasons." Although this provision may suggest that providing explanatory text alone may be sufficient in the instant matter, it is not dispositive. This guidance was intended to ensure that tenants and visitors understand the historical significance of artwork. It was neither intended to address the problem that artwork may create a discriminatory workplace environment nor the offensive nature of artwork to leaders of other sovereigns with which the government must consult.

The order also provides that, "[r]emoval of artwork shall be carried out in accordance with GSA policy, as directed in the GSA Fine Arts Desk Guide." As articulated in the Guide, "portable works" included in the GSA Fine Arts collection are "available for loan to museums, within central office, and to regional headquarters in order to make them accessible to a broader audience and to support GSA's mission to promote superior workplaces."[3] Almost all of the murals in question are "portable" in that they may be removed from the wall. Thus, as anticipated by the Guide, it would be appropriate to loan these works to museums so that they may be viewed in their proper context by a larger audience.

Federal agencies are authorized, under 16 U.S.C. § 470h-3, after consultation with the ACHP, to implement alternatives for historic properties "that are not needed for current or projected agency purposes" and may "exchange any property owned by the agency with comparable historic property, if the agency head determines that the lease or exchange will adequately ensure the preservation of the historic property." As the offensive paintings and murals are needed neither by the EPA nor the GSA to fulfill their missions, the Administrators of those agencies would not violate the NHPA by exchanging them for historic properties. Moreover, since the Post Office Department (now the U.S. Postal Service) moved out of the Ariel Rios building, the "theme" of the paintings is no longer keeping with the building's current use.

GSA's Fine Arts Desk Guide states, "[a]dverse public opinion does not justify the relocation or removal of artwork." GSA, Fine Arts Program Desk Guide § 10.2 (2002). Also, a GSA maintenance guide cites office moves, changing tastes, and the painting of walls as reasons why paintings may not remain hanging on walls.[4] As stated in the maintenance guide, "(t)here are professional companies who do nothing, but wrap, crate, transport, and store artwork."[5]

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[3] Sec. 1.3 of the GSA Fine Arts Program Desk Guide – 2002.

[4] Recommendations for the Care and Cyclic Maintenance of Artwork in the Fine Arts Collection, Nov. 2002. http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/maintenance_guide (accessed on

This is not a situation where GSA must relocate or remove the paintings in response to the winds of "adverse public opinion" or "changing tastes." Instead, GSA has an opportunity to relocate or remove the paintings in order to promote a deeply held civic belief about respect and tolerance in American society and fulfill its mission to promote superior workplaces.

GSA must turn to its guidelines addressing changes in use and mission of government buildings. GSA policy understands that, "[f]ederal buildings undergo many changes during their lifetime. As government missions change and priorities change, Federal agencies are created, expanded, and abolished. As a consequence, requirements for space and services change frequently, and space must be reconfigured often." *See* "General Design Philosophy: Flexibility and Adaptability," 2003 Facilities Standards (P100) § 1.2 (2003). Ariel Rios and the federal government's priorities have changed considerably since the 1930s.

In addressing the historic prejudices reflected in the art in the Ariel Rios building, GSA is pursuing the course it believes is correct in consulting with affected parties through the procedures required by the NHPA. Section 106 of the NHPA requires federal agencies with jurisdiction or authority over a "proposed Federal or federally assisted undertaking" to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. 470f. Under NHPA, an "historic property" is "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource." 16 U.S.C. 470w(5); *see also* 36 C.F.R. 800.16.

Significantly, however, GSA is free to pursue any substantive course of action under the NHPA because the Act only requires that an agency go through a consultation process with interested parties. *See* 16 U.S.C. 470f; *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999). Thus, even if GSA determines the paintings are "historic properties" covered under the NHPA, and even if GSA determines that mitigation measures proposed herein will 'adversely affect' the paintings,[6] the NHPA does not require any substantive result. It only requires GSA to engage in the Section 106 consultation according to federal regulations and its own internal guidelines. In settling on its ultimate course of action, however, under the NHPA, GSA is free to

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June 3, 2004) The Maintenance Guide, also, states that the "(h)andling and storage of works of art in GSA's Fine Arts Collection should be coordinated through the Fine Arts Program, GSA/PCE. The Fine Arts Program maintains the Fine Arts Storage Facility and coordinates professional art transport for the collection. Specific instructions are included in the guide about the appropriate manner and location to store artwork."

[5] Recommendations for the Care and Cyclic Maintenance of Artwork in the Fine Arts Collection, Nov. 2002. http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/maintenance_guide (accessed on June 3, 2004)

[6] Removing and relocating the paintings would likely be an adverse effect, as defined by 36 CFR 800.5(a)(2)(iii), as would covering them, or affixing an educational plaque, as defined by 36 CFR 800.5(a)(2)(iv)-(v).

consider a number of substantive policies, including the elimination of a hostile workplace environment.

According to GSA's Federal Management Regulations, an undertaking that would adversely affect an historic property must be preceded by (1) consultation with the State Historic Preservation Officer, the Advisory Council on Historic Preservation; and (2) the development of mitigation measures "to the extent that is feasible and prudent." Historic Preservation, Federal Management Regulations § 102-78.40; *see also* 36 CFR 800.6)(a)-(b). The NHPA and its accompanying regulations, set out in 36 CFR 800, do not require specific mitigation measures. GSA can thus select from a range of options with respect to the six paintings at Ariel Rios. We have made recommendations, as discussed in section VI below.

## V. EPA's Perspective

EPA has apparently acceded to GSA full authority over the paintings at the Ariel Rios building and will not act as an agency decision-maker in this matter. *See* Letter from David J. O'Connor, EPA Acting Assistant Administrator, to Audrey Wiggins and Sarah Crawford, Staff Attorneys, Lawyers' Committee for Civil Rights Under Law (May 27, 2004) ("The General Services Administration (GSA) controls and manages this historic building [Ariel Rios building] … EPA does not have the authority to make any decisions regarding the maintenance or disposition of the murals.").[7] However, it is useful to review the positions of former EPA Administrators to better understand the agency's previous stance on the issue. In 1999, former EPA Administrator Carol Browner recommended that the Ariel Rios paintings be removed. See Attachment 1, Smith Affidavit ¶¶ 12. In a memorandum sent to EPA employees, EPA's Assistant Administrator, Romulo Diaz, Jr., revealed that Mrs. Browner "has told me that she finds the murals deeply troubling and inappropriate for display in EPA's workplace [and] asked me to ensure that the murals are covered until we are to reach our ultimate goal of removing them from public view." See Attachment 1, Smith Affidavit Exhibit B.

## VI. Conclusion and Recommended Mitigation Measure

In summary, the six paintings, prominently located in a federal workplace, create a hostile and discriminatory work environment for many American Indians and other employees. See Attachment 1, Smith Affidavit ¶¶ 10, 11. GSA, as Ariel Rios' chief steward, should use the Section 106 consultation to consider and implement mitigation measures consistent with the federal government's evolving relationship with American Indians.

It is our clients' position that none of the paintings should be displayed in a workplace setting. All paintings painted on canvas should be removed from the workplace. Additionally, the frescoes painted directly on the wall should be covered, if they cannot be removed from the workplace. Removing or concealing all six paintings from the Ariel Rios building will not violate NHPA because the paintings are not necessarily covered by the Act, and even if they are, the Act imposes no substantive duties to protect them.

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[7] We disagree. The EPA, as our client's employer, is responsible for the work environment it provides regardless of its status as a tenant of a building maintained by a landlord.

We appreciate the opportunity to provide our input in this process and look forward to working with GSA as it develops means to address the workplace issues created by this artwork.